IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.303 OF 2004
(For condonation of delay)

ALONG WITH

CRIMINAL APPLICATION NO.1158 OF 2005
(For leave to appeal)

The State of Maharashtra — Applicant
vs.
Madhukar Pandharinath Sangale — Respondent

Ms.V.R.Bhonsale, Addl. Public Prosecutor for the State.

CORAM : R. M. LODHA &
R. S. MOHITE,JJ.

DATED : 23rd February 2005

P.C.

Heard Ms.V.R.Bhonsale, the learned Addl. Public Prosecutor.

2. On February 6, 2004 this Court passed the following order:

> "1. In filing this appeal, there is delay of 128 days i.e. delay of four months and eight days. The entire delay has taken place in the office of the Public Prosecutor, High Court, Bombay. As per this application, the papers were received by the office of Public Prosecutor, High Court, Bombay on 16/8/2003 and the appeal came to be filed on 15/1/2004. Thus, no action was taken in the matter by the office of the Public Prosecutor, High Court, Bombay for a period of four months and eight days. The only explanation given for delay in filing the appeal is mentioned in paragraph 4

of this application which was a stock explanation given in identical words in several matters by that office to which the attention of the Law Ministry was drawn in some matters last year. In many matters this court had imposed cost on the State Government for filing appeals after a considerable delay without there being any adequate explanation, but nothing seems to have improved the functioning of the office of the Public Prosecutor, High Court, Bombay and the remarks passed by this curt and the cost imposed against the State have no effect at all.

2. One more chance is given to the State to file the affidavit of the person at whose end the delay has occurred and to give explanation for the said delay. Instead of rejecting this application at this stage, we give this opportunity to the State but not without asking the State to pay cost of Rs.500/- to the Legal Aid Cell of the Bar Council of Maharashtra. The affidavit of the proper person explaining the delay shall be filed within two weeks only on payment of Rs.500/- to the Legal Aid Cell of the Bar Council of Maharashtra.

3. Stand over for two weeks."

3. Pursuant thereto an affidavit of Mr.A.M. Shringarpure, Additional Public Prosecutor has been filed on 8th April 2004. In paragraph 2 of the said affidavit it is stated thus:

"2. I say that File No.725/2003 was handed over to me on 17.8.2003 to draft the Appeal against the Order of Acquittal passed by the learned Addl. Sessions Judge, Niphad, Dist: Nashik in Sessions Case No.15/2002 dtd.30.4.2003. I further say that due to some pendency of work with me like urgent admission, final hearing, etc. I could not prepare the Appeal memo in the reasonable time. I say that to my knowledge I prepared the Appeal memo within 15 days and handed over the same to the concerned clerk for presenting the Appeal in this Hon'ble High Court. I

> further say that the rest of the delay has been caused for presenting the appeal in the Hon'ble High Court by the office of the Public Prosecutor, High Court (A.S.), Mumbai due to the pressure of work load and ill-health of the concerned clerk and the delay was not deliberate and intentional to prejudice the right of the respondents. I tender apology on behalf of myself as well as on behalf of the inconvenience caused by the office in causing the delay to file the appeal in this Hon'ble High Court."

4. We are afraid, the aforesaid explanation hardly impresses us for condonation of delay. Though it is stated that the concerned file was handed over to him on 17th August 2003 to draft the appeal against the judgment of acquittal dated 30th April 2003 and he prepared the appeal within 15 days, but we find that the appeal was filed as late as on 16th January 2004. The Additional Public Prosecutor has passed on burden to the office of Public Prosecutor for that delay. We fail to understand if the appeal was prepared within 15 days of 17th August 2003, the presentation of appeal could not have been delayed due to pressure of workload and ill-health of the concerned clerk. Thus, we find that the explanation is not only not acceptable constituting sufficient cause, but also seems to have been made for the sake of making of it.

5. Thus, we are of the view that delay of 128 days cannot be condoned.

6. Though the criminal application for leave to appeal is time barred and deserves to be thrown out being time barred, we examined the impugned judgment to find out whether a case for grant of leave was made out if the appeal was treated within time.

7. The respondent stood tried for the offence punishable under section 436 IPC. According to prosecution case, the accused set cattle-shed of PW-4 on fire by throwing burning match stick and ran away.

8. The prosecution mainly relied upon the evidence of Manjula (PW-4) and her son Yogesh (PW-7). PW-4 is not eye-witness. PW-7 has been examined as the eye-witness. There is material contradiction in the deposition of PW-7. In paragraph 10 and 12 of the impugned judgement, the learned Judge analysed the evidence of PW-7 thus:

> "10. Other material witness in this case is 9 years old Yogesh Sukhdeo Aghav, who has deposed at Exh.22. He says that at the time of incident he was at the backside of the house. At about 2.30 p.m. he was playing behind the house. He saw accused set the cattle shade on fire with match stick. He threw match box in the filed and left the place on motor-cycle. He further says that he shouted and told to his maternal aunt (P.W.4) about the fire. In his cross examination at exh.22 this witness says that he has stated before police that he was playing at the back side of the house and can not say why it is not in his statement before police. He further says that he has stated police that he was standing on the plat farm at the time of the incident. In this respect learned counsel

for the accused pointed out that this witness says in his cross examination that there is plat-farm at the eastern side of the house and there is no other plat farm at the back side of the house. He further says that he has stated before the police that the accused set cattle shade on fire with match stick. He can explain not say why it is not in his statement before police. He further says that his three maternal uncles and their wives were in the house. He further says that all his maternal uncles and their wives came out of the house when he shouted. He gave the names of three maternal uncles. They were Vasant, Balu and Valu, who were in the house at the time of incident. In this respect informant Valu alias Valiba says in his chief as well as in his F.I.R. that he was not in the house. On the other hand he says he was in his other land. He saw the smoke and fire and rushed towards the house. The another maternal uncle Balu was no more at the time of the incident. He was already dead. When PW 7 Yogesh says that Balu and Valiba were inside the house and they came out of the house with their wives when he cried. This version of P.W.7 show he is not a trust worthy witness to rely up on. Evidence of P.W.1 shows that he was not in the house and his brother Balu was no more. This is a material contradiction in the version of the star witness P.W.7 who is the eye witness. It creates serious doubt even about presence of PW 7 Yogesh at the time of alleged fire.

12. P.W.no.7 was about 7 years old and was attending the School at M.I.D.C.Sinnar. He replied in his cross that he does not know the persons from his village. His understanding also appears poor. He further says that he does not know how many members are in the family of the accused. In this respect, it is pertinent to note that informant is residence of Mahajanpur. Witness Yogesh deposed in his chief at Exh.22 that he attend S.G. Public School at Sinnar. He further says that he does not know the names of family members of the accused. One Puja is studying in his school. He does not know name of her father. He further says that in all 7 pupil go to school with him in the same bus. He does not know name of their fathers. In such circumstances, this witness has not explained how he was knowing the accused by his name and

how told he to p.w.4 that accused set the cattle shade on fire. He is not resident of village Talawade where the accused resides and has not explained how he was knowing the accused. Furthermore, it is important to note that he says that he could not say why it is not in his statement before police that accused set the cattle shade on fire with match stick. In this respect, I would like to refer the F.I.R.Exh.15, wherein informant Valiba has narrated that his brother's wife, Manjula his sister and her son Yogesh told him that accused Madhu Sangale set the cattle shade on fire with the help of match stick. It is not mentioned in the F.I.R. that Yogesh had seen accused while setting the cattle shade on fire. Further more, I would also like to refer office copy of the report sent by Kamgar Talathi to Tahasildar about the burnt case of cattle shade and damage out of it, in which it is mentioned that informant Valiba had expressed suspicion about the involvement of accused in respect of the incident. It indicates that the case is based on mere suspicion. Possibility of concoction also cannot be ruled out as informant and his family members had sent number of complain applications against the accused alleging that the accused had caused the death of his brother Balu. All these circumstances create serious doubt in the version of PW 7 Yogesh, who is alleged to be an eye witness."

9. The learned Additional Public Prosecutor could not show that the consideration of the evidence of PW-7 (child witness) by the learned trial Judge suffer from error. As a matter of fact in his cross-examination PW-7 admitted that he was not knowing the persons from the village. He even did not know how many members were in his family. He even did not know the names of the family members. He was not able to explain as to how he was knowing the accused by name and on what basis he told PW-4 that accused set the cattle shed on fire.

10. All in all, it appears to us and rightly held to be so by the learned trial Judge that the PW-7 is not an eye-witness.

11. The view of the learned trial Judge regarding the evidence on record is the possible view and the acquittal of the accused-respondent cannot be said to suffer from any legal infirmity.

12. Consequently, criminal application no.303/2004 and criminal application no.1158/2005 (for leave to appeal) are dismissed.

(R.M.LODHA,J.)

(R.S. MOHITE,J.)